In the Matter of the Compensation of
JULIE A. DANIELS, Claimant
WCB Case No. 20-05332
ORDER ON RECONSIDERATION
Dale C Johnson, Claimant Attorneys
Sather Byerly Holloway - SBH Legal, Defense Attorneys

Reviewing Panel: Members Ousey, Curey, and Wold. Member Curey dissents.

On February 25, 2022, we abated our February 9, 2022, order that: (1) found that claimant's medical services claim for a Nevro high-frequency spinal cord stimulator (Nevro) trial and Dr. Morgan's treatment from June 2019 through September 2020 was causally related to claimant's 2004 work injury; and (2) awarded a "contingent" assessed attorney fee for claimant's counsel's services at the hearing level and on review. We took this action to address claimant's request for reconsideration of that portion of the order that awarded a "contingent" assessed attorney fee, and the self-insured employer's cross-request for reconsideration of that portion of the order that found that the disputed medical services were causally related to claimant's 2004 low back injury. Having received the parties' arguments, we proceed with our reconsideration.

We begin with the employer's challenge to our determination regarding the disputed medical services. The employer asserts that Dr. Morgan's treatment from June 13, 2019 through September 3, 2020, and her recommendation for a Nevro trial were not for a condition caused in material or major part by claimant's 2004 work injury. Specifically, relying on *SAIF v. Sprague*, 346 Or 661 (2009), the employer contends that there is no medical evidence establishing that the disputed medical services were "for" or "directed to" a specific condition. According to the employer, without such evidence, we are unable to determine whether the condition is ordinary, consequential, preexisting, or combined for purposes of determining the legal standard to be applied under ORS 656.245(1)(a). Although we agree with the employer's contention that the disputed medical service(s) must be "for" or "directed to" a specific condition caused in material or major part by the work injury, we disagree with the employer's evaluation of the medical evidence.[1]

[1] Under ORS 656.245(1)(a), an insurer is required to provide "medical services for conditions caused in material part by the [compensable] injury." *See Garcia-Solis v. Farmers Ins. Co.*, 363 Or 26, 37 (2019). In *Garcia-Solis*, the court explained that "'[compensable] injury' in the first sentence of ORS 656.245(1)(a) appears clearly to refer to the work accident and not to any resulting medical conditions,

Here, Dr. Morgan has been treating claimant for pain management related to her low back conditions since 2005. (Ex. 52-2).

On May 22, 2014, Dr. Kitchel examined claimant at the employer's request. (Ex. 29). Dr. Kitchel reviewed claimant's medical history, including a description of her 1996 and 2004 injuries. He noted that claimant had treated with Dr. Morgan for low back pain throughout the years since her 2004 injury and had received injections, physical therapy, chiropractic care, pool therapy, acupuncture, medications, a spinal cord stimulator, and a pain medicine delivery system, none of which had changed her pain remarkably. (Ex. 29-2). He explained that claimant had a recent "flare up" of symptoms, which he believed to be related to the use of baclofen in claimant's pain pump, but stated that claimant's symptoms had returned to baseline at the time of his examination. (*Id.*)

Dr. Kitchel explained that claimant's accepted lumbar strain and L3-4 annular tear were secondary to the 2004 work injury. (Ex. 29-15). He opined that claimant also showed evidence of "chronic pain syndrome" secondary to the 2004 work injury. (*Id.*) Additionally, he opined that claimant may have developed arachnoiditis related to the use of baclofen in her intrathecal pain pump. (*Id.*) Dr. Kitchel recommended that claimant continue pain treatment with Dr. Morgan, including the continued use of the intrathecal pain pump and oral medications. (Ex. 29-16).

Between 2014 and September 2020, Dr. Morgan continued to treat claimant for chronic low back pain, which did not change significantly since Dr. Kitchel's 2014 examination.[2] (Exs. 31, 32, 36-43, 45-51, 54, 56). During the time of the disputed medical services (June 2019 through September 2020), the majority of

---

accepted or otherwise." *Id.* In *Sprague*, the Court had held that determining the compensability of a medical service turns on the characterization of the conditions the medical services are "for." The first step in this process is identifying the condition or conditions being treated. 346 Or at 672-73.

Reconciling the reasoning of *Sprague* and *Garcia-Solis*, in resolving a medical services claim, our recent decisions have necessarily identified a specific condition to analyze causation under ORS 656.245(1)(a). *See Paul A. Harvey*, 73 Van Natta 34 (2021) (disputed surgery directed to the claimant's accepted combined lumbar strain condition); *Daniel B. Slater*, 71 Van Natta 962 (2019) (disputed left knee MRI was "for" or "directed to" the claimant's left knee meniscal tear); *Paul A. Mosley*, 71 Van Natta 719 (2019) (disputed medical bills were for treatment related to an "infection/compressed nerve" condition).

[2] Claimant continued to describe her pain in a manner consistent with that recorded by Dr. Kitchel. That is, her average low back pain severity ranged from a two to five out of 10 and her pain with activity increased to an eight or nine out of 10. (*See* Exs. 29-3, 31-1, 45-1).

claimant's appointments with Dr. Morgan involved providing a refill of claimant's intrathecal pain pump. (Exs. 37-1, 38-1, 39-1, 41-1, 42-1, 43-1, 45-1, 46-1, 47-1, 48-1, 51-1, 54-1). In October 2018, Dr. Morgan recommended a Nevro trial in an attempt to reduce claimant's use of oral pain medications and her reliance on the intrathecal pain pump. (Ex. 32-2). Further, she noted that the Nevro stimulator could be more effective at reducing claimant's pain. (Exs. 32-2, 52-3).

Finally, in an August 6, 2020, concurrence report, Dr. Morgan opined that, although claimant's need for treatment and the Nevro trial was partially caused by the failed laminotomy/discectomy related to the 1996 injury, it was also caused in material part by the 2004 work injury. (Ex. 52-2).

Reviewing the record as a whole, in context, we are satisfied that the disputed medical services are "for" claimant's chronic pain condition caused at least in material part by claimant's 2004 compensable injury. In 2014, Dr. Kitchel opined that claimant had developed "chronic pain syndrome" secondary to the 2004 work injury and recommended that Dr. Morgan continue to treat claimant for that condition, including maintaining the intrathecal pain pump. (Ex. 29-16). Although Dr. Morgan did not list "chronic pain syndrome" as a specific diagnosis, her chart notes record that she has treated claimant for chronic low back pain since Dr. Kitchel's 2014 diagnosis of chronic pain syndrome and during the period of the disputed medical services. (Exs. 32-1, 36-1, 45-1, 50-1, 54A-1). As noted above, most of the treatment during the disputed period involved refilling claimant's intrathecal pain pump, which Dr. Kitchel recommended that clamant continue. (Exs. 29-16, 37-1, 38-1, 39-1, 41-1, 42-1, 43-1, 45-1, 46-1, 47-1, 48-1, 51-1, 54-1). Further, Dr. Morgan opined that her treatment of claimant (which involved management of claimant's chronic pain, including refilling her intrathecal pain pump) and the need for the Nevro trial (which could be more effective at treating claimant's pain and would reduce her reliance on pain medications) were caused in material part by the 2004 work injury. (*See* Exs. 37-1, 38-1, 39-1, 41-1, 42-1, 43-1, 45-1, 46-1, 47-1, 48-1, 51-1, 52-2, 54-1).

Under such circumstances, we interpret Dr. Morgan's opinion, as supported by Dr. Kitchel's opinion, to persuasively support a conclusion that the disputed medical services were for claimant's chronic pain condition that was caused at least in material part by the 2004 compensable injury.[3] (Ex. 52-2, -4-5); *see SAIF v.*

[3] The employer contends that the low back conditions referenced in the record are not for "ordinary" conditions but, rather, "a mix of potential preexisting, consequential and combined conditions." However, Dr. Kitchel described both the accepted conditions (which were caused directly by the 2004 work injury) and the "chronic pain syndrome" as "secondary" to the 2004 work injury. In contrast, he

Strubel, 161 Or App 516, 521-22 (1999) (medical opinions evaluated in context and based on the record as a whole); *Freightliner Corp. v. Arnold*, 142 Or App 98, 105 (1996) ("magic words" not required for a persuasive medical opinion). We find no reason not to defer to Dr. Morgan's opinion. *Weiland v. SAIF*, 64 Or App 810, 814 (1983) (absent persuasive reasons not to do so, more weight given to treating physician because of a better opportunity to observe the claimant's condition); *Diana G. Hults*, 61 Van Natta 1886, 1888 (2009) (more weight accorded to opinions of physicians who had greater opportunity to observe claimant's condition over time). Thus, we find that Dr. Morgan's opinion persuasively establishes that the disputed medical services were sufficiently causally related to the 2004 work injury under ORS 656.245(1)(a).

In doing so, we discount Dr. Swanson's contrary opinion. Dr. Swanson examined claimant at the employer's request in December 2018. (Ex. 33). He opined that because claimant's accepted conditions of a lumbar strain and an L3-4 annular tear had been declared medically stationary in 2004 and 2008, her current complaints were unrelated to her 2004 "work activities." (Ex. 32-35-36). Yet, as the court explained in *Garcia-Solis v. Farmers Ins. Co.*, 363 Or 26, 37 (2019), medical services need not be directed to an accepted condition as long as they are directed to a condition at least materially caused by the compensable injury. 365 Or at 43. Dr. Swanson did not adequately address Dr. Morgan's opinion that the need for the disputed medical services was caused in material part by claimant's 2004 compensable injury. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009) (medical opinion was less persuasive when it did not adequately address contrary opinions). Thus, we discount Dr. Swanson's opinion.

Moreover, Dr. Swanson's opinion does not sufficiently explain how claimant's "biopsychosocial" factors, which he identified as contributing to claimant's complaints of chronic low back pain, were the cause of claimant's current conditions and need for treatment without any material contribution from the 2004 compensable injury. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433

---

specifically explained that the possible arachnoiditis was related to the work injury because it resulted from the treatment for that injury. Under such circumstances, we are satisfied that the record establishes the "chronic pain syndrome" condition as an "ordinary" condition caused directly by the work injury. Additionally, although Dr. Morgan opined that claimant's treatment and need for the Nevro trial was also caused by the failed laminotomy/discectomy related to the 1996 injury, "ORS 656.245(1)(a) does not limit the compensability of medical services simply because those services also provide incidental benefits that help or treat noncompensable medical conditions." *Slater*, 71 Van Natta at 967 (citing *Sprague*, 346 Or at 665).

(1980) (rejecting unexplained/conclusory medical opinion). Specifically, Dr. Swanson listed claimant's "preexisting" chronic low back pain as a "biopsychosocial" factor contributing to claimant's need for treatment and noted that patients with a history of chronic pain have a higher incidence of developing chronic pain in the future. (Ex. 33-33, -35). In doing so, however, he referenced only one chart note and one imaging report that predated the 2004 work injury. (Ex. 33-33). He did not explain how those records established "preexisting chronic" low back pain or why claimant's post-injury low back pain complaints, including the chronic pain syndrome recorded by Dr. Kitchel, were not related to the 2004 work injury. *See Moe,* 44 Or App at 433. Moreover, his opinion regarding the preexisting low back pain was general in nature and not specific to claimant's particular circumstances. *See Sherman v. Western Employers Ins.*, 87 Or App 602 (1987) (little weight given to comments that were general in nature and not addressed to the claimant's particular situation).

Additionally, referencing chart notes in claimant's medical records from 2004 and 2006, Dr. Swanson opined that preexisting bipolar disease, depression symptoms, and anxiety were "biopsychosocial" factors contributing to claimant's chronic low back complaints. (Ex. 33-34-36). However, Dr. Swanson did not personally diagnose such conditions. Further, he provided no explanation for his opinion regarding the conditions beyond stating that "individuals with bipolar disease and depression often times have somatic focus with subjective complaints outweighing objective abnormalities." (Ex. 33-34). Under such circumstances, in the absence of further explanation regarding the "biopsychosocial" factors, we find Dr. Swanson's opinion unpersuasive. *See Sherman*, 87 Or App at 606;

Based on the aforementioned reasoning, after considering the employer's arguments on reconsideration, we adhere to our prior order and further find that the disputed medical services are for a condition(s) that was caused in material part by claimant's 2004 compensable injury.

We turn to claimant's motion for reconsideration challenging the contingent attorney fee awarded in our prior order. For the following reasons, we adhere to our prior order.

In October 2020, the employer submitted a specification of Medical Issues to the Workers' Compensation Division (WCD), contending that Dr. Morgan's disputed medical services were not causally related to the accepted claim and that the services were excessive, inappropriate, and ineffectual. (Ex. 55A-2). In November 2020 and February 2021, the WCD issued Defer and Transfer Orders, which referred the dispute to the Board's Hearings Division. (Exs. 57, 58).

Under ORS 656.704(3)(b)(C), the issue of the causal relationship of a disputed medical service to the compensable injury is within the Board's jurisdiction. *AIG Claim Servs. v. Cole*, 205 Or App 170, 173 (2006). Under ORS 656.704(b)(B), the issue of the reasonableness of the medical services is within the Director's jurisdiction. *Id*. at 173-74. Claimant must prevail on both issues for the disputed medical services to be "compensable." In *Cole*, the court explained that, under the express language of ORS 656.386, "a fee is awarded only when a claimant 'finally prevails' over a denied claim." *Id*. at 179. "The plain language of the statute simply does not authorize attorney fees when a claimant prevails on one aspect of the determination of compensability." *Id*.

Claimant acknowledges that in *Antonio Martinez*, 58 Van Natta 1814, 1822 (2006), *aff'd, SAIF v. Martinez*, 219 Or App 182 (2008), involving similar issues as in this case, we awarded an assessed attorney fee award "contingent" on the claimant also prevailing over the reasonableness of the disputed medical service before the WCD. She contends, however, that since *Martinez* was decided, the Board has "rewritten" its policy to recognize the need for adequate legal representation for injured workers. Yet, the amendment to OAR 438-005-0035(1) adding the phrase "while providing for access to adequate representation for injured workers" became effective January 1, 2016, and since that date we have continued to award "contingent" attorney fees in cases such as this one. (WCB Bulletin No. 1-2015, eff. 1/1/16); *see, e.g., Stephen F. Knight*, 69 Van Natta 1360, 1364 (2017).

We, therefore, disagree with claimant's contention that medical services disputes that involve "causation" and "reasonableness" involve two distinct denials and that claimant's counsel is entitled to a "noncontingent" attorney fee award under ORS 656.386(1) for prevailing over the "causation" denial, regardless of whether claimant prevails over the "reasonableness" denial. For the reasons set forth by the court in *Cole*, 205 Or App at 179, we continue to adhere to our decisions in *Knight* and *Martinez* in which we awarded a "contingent" assessed attorney fee award under ORS 656.386(1) when a claimant has prevailed over a "causation" issue, but a "reasonableness" issue remains to be decided by the WCD.

Thus, consistent with our case law, we continue to conclude that claimant's counsel's assessed attorney fee under ORS 656.386(1) is "contingent" on claimant finally prevailing over the medical services claim, including both the issues of "causation" and "reasonableness."

Claimant's counsel is entitled to an additional fee for services related to the medical services issue on reconsideration, contingent on prevailing over both aspects of the medical services claim. *See* ORS 656.382(2); *Knight*, 69 Van Natta at 1364; *Martinez*, 61 Van Natta at 1822. After considering the factors set forth in OAR 438-015-0010(4) and applying them to this issue, we find that a reasonable "contingent" attorney fee is $5,000, payable by the employer. In reaching this contingent attorney fee determination, we have particularly considered the time devoted to the issue (as represented by claimant' cross-respondent's brief on reconsideration), the complexity of the issue, the value of the interest involved, the risk that claim may go uncompensated, and the contingent nature of the practice of workers' compensation law.

Accordingly, on reconsideration, as supplemented and modified herein, we republish our February 9, 2022, order. The parties' rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on June 28, 2023

Member Curey, dissenting.

The majority opinion concludes that the opinions of Drs. Morgan and Kitchel establish that the disputed medical services were for a "chronic pain condition" that was caused at least in material part by the 2004 compensable injury. Because I disagree with that conclusion, I respectfully dissent.[4]

As noted by the majority, ORS 656.245(1)(a) requires that a medical service be "for" or "directed to" a specific condition caused in material or major part by the work injury. *See Garcia-Solis v. Farmers Ins. Co.*, 363 Or 26, 37 (2019); *SAIF v. Sprague*, 346 Or 661 (2009).

Here, Dr. Morgan, who has been treating claimant continuously since 2005, opined that claimant's 2004 work injury has been, and continues to be, at least a material contributing cause of her need for medical treatment, including the need

[4] Because I would conclude that the record does not support a sufficient causal relationship between the disputed medical services and the 2004 work injury, I would not award an attorney fee under ORS 656.386(1), contingent or otherwise. Accordingly, I also disagree with the majority opinion's contingent attorney fee award.

for a spinal stimulator and an intrathecal medication pump. (Ex. 52-2). Nonetheless, Dr. Morgan has not identified a specific condition caused by the work injury to which the disputed medical services are for or have been directed. *See* ORS 656.245(1); ORS 656.266(1); *Sprague*, 346 Or at 672-73.

First, although several of Dr. Morgan's chart notes refer to claimant's chronic low back pain, she never diagnosed a "chronic pain syndrome" or explained that the pain was a distinct condition, rather than a symptom of claimant's various diagnoses. (*See* Exs. 32-1, 36-1, 45-1, 50-1, 54A-1). Instead, as summarized below, Dr. Morgan diagnosed claimant with multiple conditions, some accepted, some not, but did not explain that the disputed medical services were "for" or "directed to" a specific condition caused in material or major part by the work injury. ORS 656.245(1).

Back in 2010, Dr. Morgan opined that claimant's need for treatment was unrelated to her 2004 work-related injury, and that the accepted L3-4 annular tear was not the primary cause of claimant's continued disability or need for treatment. (Ex. 18-2). At that time, Dr. Morgan did not recommend physical therapy or a "pain pump" for claimant's low back, and agreed that "[s]uch treatment was not expected relating to the low back injury of 2004." (*Id.*)

In April 2014, Dr. Morgan diagnosed post-laminectomy syndrome, lumbar/lumbosacral disc degeneration, and myofascial pain syndrome. (Ex. 25-2). In September 2016, Dr. Morgan agreed that "many of [claimant's] symptoms are indicative of possible arachnoiditis (scarring in the cauda equina) which would make sense with her history as well." (Ex. 31-5). She also reported that some of those symptoms could be consistent with long-term effects of baclofen in claimant's pain pump. (*Id.*)

In October 2018, Dr. Morgan treated claimant for "lumbar radiculopathy" and "lumbar degenerative disease." (Ex. 32-2). At that time, Dr. Morgan specifically stated that the Nevro trial was to treat the radiculopathy. (*Id.*) However, she did not opine or explain that the radiculopathy was causally related to the 2004 work injury.

On February 20, 2019, Dr. Morgan then diagnosed lumbar degenerative disease, lumbar radiculopathy, muscle spasm, presence of intrathecal pain pump, and lumbar post-laminectomy syndrome. (Ex. 36-1). In January 2020, Dr. Morgan stated that "both lumbar radiculopathy and lumbar post-laminectomy syndrome are qualifying conditions with worker's compensation for spinal cord stimulation." (Ex. 45-2). But, again, Dr. Morgan did not opine that such conditions were causally related to claimant's 2004 work injury.

Then, in June 2020, Dr. Morgan opined that claimant's symptoms may have been due to a "thickening of the ligamentum or facet hypertrophy" at T10-11. (Ex. 49-2). Finally, in July 2020, Dr. Morgan diagnosed lumbar post-laminectomy syndrome, lumbar radiculopathy, lumbar degenerative disc disease, sacroiliitis, and muscle spasms. (Ex. 51).

From June 14, 2019 through September 3, 2020 (the period of treatment at issue), Dr. Morgan did not address any specific condition to which the disputed treatment was for or directed.

Under such circumstances, without further explanation of the various diagnoses and their relationship with the disputed medical services and the 2004 work injury, I would find Dr. Morgan's opinion insufficient to establish the requisite causal relationship between the 2004 work injury and the disputed medical services.

Further, I would find the majority's reliance on Dr. Kitchel's opinion to be misplaced. Dr. Kitchel examined claimant once in 2014, five years before the disputed medical services. (Ex. 29). Although Dr. Kitchel recommended that claimant continue treatment with Dr. Morgan (including continuing the intrathecal pain pump) at that time, that recommendation does not support a conclusion that claimant's treatment five years later was related to the "chronic pain syndrome" diagnosed by Dr. Kitchel or the 2004 work injury. (Ex. 29-16). Moreover, Dr. Kitchel's opinion that claimant had developed "chronic pain syndrome" secondary to the 2004 work injury was conclusory and completely unexplained. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (2023) (rejecting unexplained and conclusory opinion). Accordingly, Dr. Kitchel's opinion does not support a causal relationship between the disputed medical services and a condition caused in material or major part by the 2004 work injury.

Consequently, I would conclude that the record does not satisfy the requirements of ORS 656.245(1)(a). *See Sprague*, 346 Or at 664. Because the majority concludes otherwise, I respectfully dissent.